Wan Faisal bin W Hasan & Anor v Ideal Masjaya Sdn Bhd & Ors

HIGH COURT (SHAH ALAM) — WRIT OF SUMMONS NO BA-22NCC-53–04 OF 2020
FAIZAH JAMALUDIN J
6 SEPTEMBER 2022

Legal Profession — Disqualification — Conflict of interest — Application to disqualify legal firm from acting on behalf of defendants — Whether legal firm would be embarrassed — Whether conduct of solicitors in legal firm likely to be impugned — Whether it would be difficult for solicitors in legal firm to maintain professional independence — Whether it was likely that solicitors in legal firm would be called as witnesses — Whether there was conflict of interest — Legal Profession Rules (Practice and Etiquette) 1978 rr 3, 4, 5 & 28(a)

In the main suit, the plaintiffs' cause of action against the defendants was premised on the alleged fraud and wrongful acts relating to the transfer of the shares in the first defendant ('D1') from the plaintiffs to the sixth defendant ('D6') via a shares sales and purchase agreement ('the SSA') and for the sale of D1's Malay Reserved Land ('the land') by D1 to the eleventh defendant ('D11') through a sale and purchase agreement ('the SPA'). The similarity between the SSA, the SPA and the main suit was that, in all the matters, a legal firm known as Messrs Armiy Rais ('the firm') was involved in the sense that, the firm had represented D6 in the SSA and D11 in the SPA, and the firm would also represent the defendants in the main suit. Based on these facts, the plaintiffs had filed the present application ('encl 56') to disqualify the firm from acting for D1, D6, D9, D10 and D11 ('the defendants') in the main suit. The issue was whether the firm should be disqualified from representing the defendants. In opposing encl 56, the defendants submitted that: (a) the court should dismiss encl 56 because the firm was not a party to this suit; (b) there were no disputed material question of facts that would require the presence of solicitors from the firm as witnesses; and (c) even if the solicitors from the firm were called as witnesses, the solicitors would only be asked questions relating to 'formal or non-contentious' matters, as such, the firm was not prohibited from acting for the defendants in this case.

Held, allowing encl 56:

(1) The court found that the firm would be embarrassed during the trial since the firm were likely to have been in possession of confidential information from having acted for D6 in the SSA and D11 in the SPA, both of which were the subject matters of this suit. The firm was also

likely to possess confidential information as to how its client, D6, replaced the plaintiffs as shareholders of D1 without the original signed share transfer forms (see para 34).

(2) It was not necessary for the solicitor whose conduct was likely to be impugned to be made party in a suit in order for that solicitor to be prohibited from acting in a case. Under r 4 of the Legal Profession Rules (Practice and Etiquette) 1978 ('LPE(PE) 1978'), it was sufficient that if there was reason to believe that the solicitor's conduct would be impugned for him to be prohibited from acting in the said case. The court found that based on the pleadings and the evidence in the affidavits, there was reason to believe that the professional conduct of the solicitors in the firm was likely to be impugned in this case in relation to the transfer of shares without the original transfer documents as well as the replacement of the plaintiffs as the directors of D1 without the plaintiffs' resignation letters. It would entail the solicitors in firm that had negotiated, advised, acted for, and represented D6 in the SSA to be called as witnesses during the trial (see paras 35–36).

(3) The disputed facts in the present case were in relation to the alleged fraud and/or wrongful acts perpetrated on the plaintiffs through or in relation to the SSA and the SPA and the firm had been involved in both agreements. Hence, there was every reason to believe that the solicitors in the firm who had been involved in the negotiations, drafting, acting and/or representing the parties in the SSA and SPA would be called as a witness in the trial of this suit. Thus, for this reason alone, under r 28(a) of the LPR(PE) 1978, the firm ought to be disqualified from acting for any of the defendants in this suit (see para 42).

(4) The court was of the view that neither the defendants nor the court were in a position to second guess the type of questions that the learned counsel for the plaintiffs would be asking the lawyers from the firm who would be called to testify as witnesses during the trial in this suit. Moreover, r 28(a) of the LPR(PE) 1978 stated that if there was reason to believe that an advocate or solicitor would be called as a witness in any case, he should not appear in court in that case. Rule 28(a) did not state that an advocate and solicitor could act for a client in any case in court even if it was likely that he would be called as a witness in that case because he would only be asked 'formal or non-contentious questions' (see para 44).

(5) In view of the firm's role in the SSA and SPA, the court found that it would render it difficult for the lawyers in the firm who had advised and negotiated the SSA and SPA and who had acted for and represented D6 and D11 in both transactions to maintain their professional

independence. This was especially in view of the conflict of interests and the likelihood that their conduct and that of the firm's may be impugned in this suit (see para 45).

(6) Based on the above reasons, it would be incompatible with the best interest of justice for the firm to continue representing the defendants in this suit. Therefore, the court found that pursuant to rr 3, 4, 5 and 28(a) of the LPR(PE) 1978, the firm should no longer act for or represent D1, D6, D10 and D11 in this suit (see para 46).

[Bahasa Malaysia summary

Dalam saman utama, kausa tindakan plaintif-plaintif terhadap defendan-defendan adalah berdasarkan dakwaan penipuan dan perbuatan salah yang berkaitan dengan pemindahan saham dalam defendan pertama ('D1') daripada plaintif-plaintif kepada defendan keenam ('D6') melalui perjanjian jual beli saham ('PJBS') dan untuk penjualan Tanah Rizab Melayu D1 ('tanah tersebut') oleh D1 kepada defendan ke-11 ('D11') melalui satu perjanjian jual beli ('PJB'). Persamaan antara PJBS, PJB dan saman utama ini ialah, dalam semua perkara tersebut, firma guaman yang dikenali sebagai Tetuan Armiy Rais ('firma tersebut') terlibat di mana firma tersebut telah mewakili D6 dalam PJBS dan D11 dalam PJB, dan firma tersebut juga akan mewakili defendan-defendan dalam saman utama. Berdasarkan fakta ini, plaintif-plaintif telah memfailkan permohonan semasa ('lampiran 56') untuk membatalkan kelayakan firma tersebut daripada bertindak bagi pihak D1, D6, D9, D10 dan D11 ('defendan-defendan') dalam saman utama. Isunya ialah sama ada firma tersebut telah hilang kelayakan daripada mewakili defendan-defendan. Dalam menentang lampiran 56, defendan-defendan berhujah bahawa: (a) mahkamah harus menolak lampiran 56 kerana firma tersebut bukan pihak dalam saman ini; (b) tidak ada persoalan material yang dipertikaikan tentang fakta yang memerlukan kehadiran peguam cara daripada firma tersebut sebagai saksi; dan (c) walaupun peguam cara dari firma tersebut dipanggil sebagai saksi, peguam cara hanya akan ditanya soalan yang berkaitan dengan perkara 'formal or non-contentious', oleh itu, firma tersebut tidak dilarang untuk bertindak bagi pihak defendan-defendan dalam kes ini.

Diputuskan, membenarkan lampiran 56:

(1) Mahkamah mendapati bahawa firma tersebut akan berasa malu semasa perbicaraan kerana firma tersebut berkemungkinan memiliki maklumat sulit hasil daripada mewakili D6 dalam PJBS dan D11 dalam PJB, yang mana kedua-duanya adalah perkara yang dipertikaikan dalam tindakan ini. Firma tersebut juga berkemungkinan memiliki maklumat sulit tentang bagaimana kliennya, D6, menggantikan plaintif-plaintif sebagai pemegang saham D1 tanpa borang pindahan saham asal yang ditandatangani (lihat perenggan 34).

(2) Adalah tidak perlu bagi peguam cara yang kelakuannya mungkin dipertikaikan untuk dijadikan pihak dalam saman untuk membolehkan peguam cara tersebut dilarang daripada bertindak dalam sesuatu kes. Di bawah k 4 Kaedah-Kaedah Profesion Undang-undang (Amalan dan Etiket) 1978 ('Kaedah 1978'), adalah memadai sekiranya terdapat sebab untuk mempercayai bahawa kelakuan peguam cara tersebut akan dipertikaikan baginya untuk dilarang daripada bertindak dalam kes tersebut. Mahkamah mendapati berdasarkan pliding dan keterangan dalam afidavit, terdapat sebab untuk mempercayai bahawa kelakuan profesional peguam cara dalam firma tersebut berkemungkinan akan dipertikaikan dalam kes ini berhubung pemindahan saham tanpa dokumen pemindahan asal serta penggantian plaintif-plaintif sebagai pengarah-pengarah D1 tanpa surat peletakan jawatan plaintif-plaintif. Ia akan memerlukan peguamcara firma tersebut yang telah berunding, menasihati, bertindak dan mewakili D6 dalam PJBS tersebut untuk dipanggil sebagai saksi semasa perbicaraan (lihat perenggan 35–36).

(3) Fakta yang dipertikaikan dalam kes ini adalah berkaitan dengan dakwaan penipuan dan/atau perbuatan salah yang dilakukan ke atas plaintif-plaintif melalui atau berhubung dengan PJBS dan PJB tersebut dan firma tersebut telah terlibat dalam kedua-dua perjanjian tersebut. Oleh itu, terdapat sebab untuk mempercayai bahawa peguamcara dalam firma tersebut yang telah terlibat dalam rundingan, merangka, bertindak dan/atau mewakili pihak-pihak dalam PJBS dan PJB tersebut akan dipanggil sebagai saksi dalam perbicaraan saman ini. Oleh itu, atas sebab ini sahaja, di bawah k 28(a) Kaedah 1978, firma tersebut sepatutnya hilang kelayakan daripada bertindak bagi mana-mana defendan dalam saman ini (lihat perenggan 42).

(4) Mahkamah berpendapat bahawa defendan-defendan mahupun mahkamah tidak boleh meneka jenis soalan yang akan ditanya oleh peguambela terpelajar bagi plaintif-plaintif kepada peguam-peguam firma tersebut yang akan dipanggil untuk memberi keterangan sebagai saksi semasa perbicaraan dalam saman ini. Selain itu, k 28(a) Kaedah 1978 menyatakan bahawa jika ada sebab untuk mempercayai bahawa seorang peguam bela atau peguam cara akan dipanggil sebagai saksi dalam mana-mana kes, dia tidak sepatutnya hadir di hadapan mahkamah dalam kes tersebut. Kaedah 28(a) tidak menyatakan bahawa seorang peguam bela dan peguam cara boleh bertindak untuk anak guam dalam mana-mana kes di mahkamah walaupun berkemungkinan dia akan dipanggil sebagai saksi dalam kes tersebut kerana dia hanya akan ditanya 'formal or non-contentious questions' (lihat perenggan 44).

(5) Mengambil kira peranan firma tersebut dalam PJBS dan PJB tersebut, mahkamah mendapati bahawa ia akan menyukarkan peguam dalam firma tersebut yang telah menasihati dan merundingkan PJBS dan PJB

tersebut dan yang telah bertindak untuk dan mewakili D6 dan D11 dalam kedua-dua transaksi tersebut untuk mengekalkan kebebasan profesional mereka. Ini terutamanya memandangkan percanggahan kepentingan dan kemungkinan bahawa kelakuan mereka dan kelakuan firma tersebut boleh dipertikaikan dalam saman ini (lihat perenggan 45).

(6) Berdasarkan alasan-alasan di atas, adalah tidak sesuai dengan kepentingan terbaik keadilan bagi firma tersebut untuk terus mewakili defendan-defendan dalam saman ini. Oleh itu, mahkamah mendapati bahawa menurut kk 3, 4, 5 dan 28(a) Kaedah 1978, firma tersebut tidak lagi harus bertindak untuk atau mewakili D1, D6, D10 dan D11 dalam saman ini (lihat perenggan 46).]

Cases referred to

Lee Kam Sun v Ho Sau Lin & Anor [1999] 4 MLJ 509; [1999] 4 CLJ 507; [1999] AMEJ 0046, HC (refd)
Quah Poh Keat & Ors v Ranjit Singh a/l Taram Singh [2009] 4 MLJ 293; [2009] 4 CLJ 316; [2009] 6 AMR 330, CA (refd)

Legislation referred to

Companies Act 2016 s 105
Legal Profession Rules (Practice and Etiquette) 1978 rr 3, 4, 5(a), 28(a)

Zulqarnain Lukman (Asri Musa & Co) for the plaintiffs.
Swee Long (with Yew Ka Hui) (Armiy Rais) for the defendants.

Faizah Jamaludin J:

INTRODUCTION

[1] The first plaintiff ('P1') and the second plaintiff ('P2') (collectively referred to as the 'plaintiffs') are seeking in their application in encl 56 to disqualify the law firm, Messrs Armiy Rais, from acting for the first defendant ('D1'), sixth defendant ('D6'), ninth defendant ('D9'), tenth defendant ('D10') and eleventh defendant ('D11') in this suit.

[2] The plaintiffs were the shareholders and directors of D1. At all material times, D1 is the registered owner and beneficial owner of a vacant Malay Reservation land held under HSM 18963 PT38859 Tempat Sungai Mangga, Mukim Rawang, Daerah Gombak, Negeri Selangor Darul Ehsan measuring approximately 1.215 hectare ('the land').

[3] The plaintiffs plead in their statement of claim that in or around the end of 2017, a Dato Chen Kon Fook was interested to purchase the land. The land is a Malay Reservation land. Accordingly, the plaintiffs entered with D6 into a

shares sales and purchase agreement dated 26 January 2018 ('SSA') for the plaintiffs to sell to D6 the total issued shares of D1 comprising of 300,000 ordinary shares ('the shares').

[4] The plaintiffs had pledged the shares to the lenders (as defined in SSA) for personal loans. The terms and conditions of the SSA stipulate that the shares were to be transferred to D6 upon payment of: (a) the purchase price of RM2m to the plaintiffs; and (b) the redemption sum of RM6m to the lenders for the redemption of the original share certificates for the shares.

[5] The security documents under the SSA, were kept by the plaintiffs' solicitors, Messrs Lee & Lim, as stakeholders ('stakeholder solicitors') pending the completion of the SSA. The security documents included the original share transfer forms for the shares and the plaintiffs' undated resignation letters as directors of D1. The stakeholder solicitors were to release the transfer documents and the resignation letters to D6 for registration of the transfer of shares and the plaintiffs' resignation as directors of D1, after D6 had paid the redemption sum of RM6m and had redeemed the original share certificates.

[6] However, D6 only paid the purchase price for the shares. It never paid the redemption sum and it never redeemed the original share certificates for the shares. To date, the original signed share transfer forms and the plaintiffs' resignation letter remains in the custody of the stakeholder solicitors.

[7] Although, D6 did not pay the redemption sum and was not given the original share transfer forms and the resignation letters, D6 managed to register on the company register at the Suruhanjaya Syarikat Malaysia ('SSM') the transfer of the shares in D1 from the plaintiff to D6 and replace the plaintiffs as directors of D1.

[8] The SSM search results on D1 showed that, based on documents filed by D1 with SSM on 14 November 2018, D6 was sole shareholder of the D1, and that the third defendant ('D3') was appointed as director of D1 on 3 August 2018 and the second defendant ('D2') was appointed as director of D1 on 31 October 2018 in place of the plaintiffs.

[9] The plaintiffs' action against the defendants in this suit relates to alleged fraud, wrongdoing etc, relating to the transfer of the shares from the plaintiffs to D6 and for the sale of the land by D1 to D11 through a sale and purchase agreement dated 9 November 2018 ('SPA').

[10] The facts show that shortly after the change of D1's directors from the plaintiffs to D2 and D3, D1 sold the land to D11 without the plaintiffs or their solicitors' knowledge. D1 had entered into the SPA with D11 for the sale of the

land by D1 to D11 for the sum of RM500,000 only. D11 admits in her affidavit in reply (encl 67) that after entering to the SPA for the purchase of the land from D1, she became the sole shareholder of D6 on 29 January 2019. As D6 is the sole shareholder of D1, and D11 is the sole shareholder of D6, it follows that D11 is ultimate shareholder of D1.

[11] The common denominator in all these transactions is the law firm, Messrs Armiy Rais. It had acted for D6 in its purchase of the shares in D1 under the SSA and it had also acted for D11 in her purchase of the land from D1 under the SPA. It is now acting for D1, D6, D10 and D11 in this instant suit by the plaintiff against the defendants.

THE FACTS

[12] The SPA between D1 and D11 was dated 9 November 2018. On 12 November 2018, Messrs Armiy Rais wrote a letter to the stakeholder solicitors stating that they represent D6 and requested for the original issue document of title for the land for their client's 'exercise of conversion' of the land.

[13] In their reply dated 14 November 2018 to Messrs Armiy Rais, the stakeholder solicitors refused to release the Land Title to Messrs Armiy Rais because the full consideration for the shares has not yet been settled and their fees have not yet been settled.

[14] Messrs Armiy Rais then replied to the stakeholder solicitors in a letter dated 19 November 2018 asking them for the full details of the amount of consideration not yet settled and the stakeholder solicitors' outstanding fees.

[15] The stakeholder solicitors replied to Messrs Armiy Rais on the same day ie, on 19 November 2018, asking Messrs Armiy Rais or their client (D6) to provide a written explanation of the following:

> An SSM search has been conducted on the Company and surprisingly, there are new and additional directors. In addition thereto, the shareholder of the company has been changed to the Purchaser notwithstanding that we are still holding the original transfer form under Section 105 of the Companies Act, original stamped certificate for the transfer of share and original share certificate pending full considerations to be settled between the related parties and our invoice.

[16] Messrs Armiy Rais did not reply to the stakeholder solicitors request for written explanation. Instead on 15 January 2019, D11 lodged a private caveat on the land. Ong Kang Yong, an advocate and solicitor practicing in Messrs Armiy Rais executed the *Surat Akuan* on the Form 19B for the lodgement of private caveat by D11 on the land.

[17] On 1 November 2019, Messrs Armiy Rais filed an originating summons at the Shah Alam High Court (OS No BA-24NCVC-1553–11 of 2019) on behalf of D1 against P1 seeking the removal of the private caveat that P1 had lodged on the land on 1 July 2019.

[18] Hasniza bt Jaini, an advocate and solicitor practising in the stakeholder solicitors, filed a police report on 21 February 2020 (Report No Petaling Jaya/002169/20) stating that on 25 February 2019, she discovered that there has been a change of directors and shareholders of D1. She stated in the police report that she had acted in the SSA and believed that there had been fraud, wrong doing, criminal breach of trust etc. in the change of the shareholders and directors of D1 and the subsequent sale by D1 of the land to D11 because, among others: (a) the original issue document of title for the land; (b) the original share certificates No 003, 004, 005 and 006 for the shares; and (c) the original transfer forms for the shares under s 105 of the Companies Act 2016 dated 31 May 2018 that was executed by the plaintiffs and D6 together with original stamp duty certificate dated 2 June 2018, were still in her custody and control as at the date of the police report.

[19] On 12 March 2020, the plaintiffs issued a letter of termination to D6 giving it a 30 day notice of its termination of the SSA because the plaintiffs discovered that D6 by itself and/or through its agent without complying with the terms of the SSA had:

(a) refused, failed and/or defaulted in complying the SSA by not redeeming the original share certificates and paying the redemption sum of RM6m;

(b) removing the plaintiffs as directors of D1;

(c) replacing others as directors of D1 in place of the plaintiffs without complying with the SSA; and

(d) transferring the shares in D1 from the plaintiffs to itself.

[20] Neither D6 nor their solicitors Messrs Armiy Rais responded to the plaintiffs' notice of termination of the SSA.

ANALYSIS AND FINDINGS OF COURT

[21] The facts show that Messrs Armiy Rais had acted for D6 for the purchase for the shares in D1 under the SSA and it had acted for D11 for the purchase of the land from D1 pursuant to the SPA.

[22] D1, D6, D10 and D11 in their affidavits in reply to this application averred that they are advised by Messrs Armiy Rais, that there are no material and disputed questions of fact in the letters written in November 2018 between

Messrs Armiy Rais and the stakeholders solicitors. They also state that they are advised by Messrs Armiy Rais that any communication between Messrs Armiy Rais and D6 in respect of Messrs Armiy Rais' letter dated 12 November 2018 to the stakeholder solicitors' requesting for the original issue document of title of the land is subject to legal professional privilege.

[23] The Legal Profession Rules (Practice and Etiquette) 1978 ('LPR(PE) 1978'), rr 3, 4, 5(a) and 28(a) provides as follows:

> 3 Advocate and solicitor not to accept brief if embarrassed
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> (a) An advocate and solicitor shall not accept a brief if he is or would be embarrassed.
>
> (b) An embarrassment arises —
>
> (i) where the advocate and solicitor finds he is in possession of confidential information as a result of having previously advised another person in regard to the same matter;
>
> (ii) where there is some personal relationship between him and a party or a witness in the proceedings.
>
> 4 No advocate and solicitor to accept brief if professional conduct likely to be impugned
>
> No advocate and solicitor shall accept a brief in a case where he knows or has reason to believe that his own professional conduct is likely to be impugned.
>
> 5 No advocate and solicitor to accept brief if difficult to maintain professional independence
>
> (a) No advocate and solicitor shall accept a brief if such acceptance renders or would render it difficult for him to maintain his professional independence or is incompatible with the best interest of the administration of justice.
>
> ...
>
> 28 Advocate and solicitor not to appear in a case where he is a witness
>
> (a) An advocate and solicitor shall not appear in Court or in chambers in any case in which he has reason to believe that he will be a witness in respect of a material and disputed question of fact, and if while appearing in a case it becomes apparent that he will be such a witness, he shall not continue to appear if he can retire without jeopardising his client's interests.

[24] Mr Ong Swee Long of Messrs Armiy Rais, in objecting to this application, submits that this court should dismiss the plaintiffs' application to disqualify the firm because Messrs Armiy Rais is not a party to this suit and the plaintiffs as former shareholders of D1 do not have legal or equitable rights to

A the land. Also, because the plaintiffs have not pleaded any fraud and/or conspiracy against Messrs Armiy Rais.

[25] To support his argument, Mr Ong cited cases on the trite principle of law that a company and its shareholders are separate legal entities and cases
B relating to a solicitor's obligation of confidentiality to its clients. He also argues that since Messrs Armiy Rais never acted for the plaintiffs, the principle of confidentiality between the firm and the plaintiffs does not apply.

[26] The factors that this court must consider in deciding whether or not to
C disqualify Messrs Armiy Rais from acting for D1, D6, D10 and D11 in this suit are those detailed in the individual rules in the LPR(PE) 1978 which prohibit advocates and solicitors from accepting a brief from a client or from appearing in court on behalf of the said client.

D

[27] Messrs Armiy Rais had acted for D6 in its purchase of the shares in D1 under the SSA. It had also acted for D11 in her purchase of the land from D1 under the SPA. It is now acting for D1, D6, D10 and D11 in this suit.

E **[28]** Having acted for D6 in the SSA and D11 in the SPA and the fact that D6 was the sole shareholder of D1 at the time D1 entered into the SPA with D11, I find that Messrs Armiy Rais would be in a position of conflict of interest in acting for D1, D6, D10 and D11 in this suit. This can be seen from Messrs Armiy Rais writing to the stakeholders solicitors under the SSA as solicitor for
F D6 asking for the land title which is not the subject matter of the SSA but is instead the subject matter of the SPA, where Messrs Armiy Rais had acted as solicitor for D11.

[29] The date of the SPA between D1 and D11 for the sale and purchase of
G the land is 9 November 2018, which was a Friday. The facts show on next working day after the date of the SPA ie, Monday 12 November 2018, Messrs Armiy Rais wrote to the stakeholder solicitors stating that it was acting for D6 and that it wants the stakeholder solicitors to release the original issue document of title of the land for 'our client's exercise of conversion of land
H soonest possible'.

[30] It is puzzling why Messrs Armiy Rais wrote to the stakeholders solicitors for the original title of the land since D6 did not purchase the land from the plaintiffs — D6 had purchased the shares from the plaintiff under the SSA. It
I was D11 who had purchased the land from D1 pursuant to the SPA.

[31] Could it be that Messrs Armiy Rais had forgotten — one working day after the date of the SPA — who it had acted for in respect of the purchase of the shares in D1 under the SSA and who it had acted for in the purchase of the

land under the SPA? Or was there another motive for Messrs Armiy Rais to ask the stakeholder solicitors on 12 November 2018 for the issue document of title for the land even though D6 did not purchase the land — taking into account the plaintiffs' pleading that they had entered into the SSA with D6 to sell all the shares in D1 to D6, after Dato Chen Kon Fook expressed his interest to purchase the land, which is a Malay Reservation land, belonging to D1.

[32] To my mind, Messrs Armiy Rais' conflict of interest is further amplified by the dispute between the plaintiffs and the defendants as to how Messrs Armiy Rais' client, D6, managed to become shareholder of D1 without paying the redemption sum under the SSA and the fact that the firm's other client, D11, a couple of months after the entering the SPA with D1, became the shareholder of D6 who is in turn the shareholder of D1. The SSM search results show that based on documents filed with the SSM on 14 November 2018, D6 had been registered as the sole shareholder of D1. Why did Messrs Armiy Rais not tell the stakeholder solicitors, in their reply dated 19 November 2018 that the transfer of shares in D1 had been affected from the plaintiffs to D6, and that D1 pursuant to the SPA had sold the land to D11?

[33] Additionally, as it was representing D6 in the SSA, why did Messrs Armiy Rais not reply to the stakeholder solicitors' request for explanation as to how D1's shareholder had changed from the plaintiffs to D6 when the stakeholders solicitors was still in possession of the original signed transfer forms and the original share certificates.

[34] Messrs Armiy Rais would also be embarrassed during the trial since the firm are likely to have been in possession of confidential information from having acted for D6 in the SSA and D11 in the SPA, both of which are the subject matters of this suit. The firm is also likely to possess confidential information as to how its client, D6, replaced the plaintiffs as shareholders of the D1 without the original signed share transfer forms.

[35] Under r 4 of the LPE(PE) 1978, contrary to Mr Ong's submissions, it is not necessary for the solicitor whose conduct is likely to be impugned to be made party in a suit in order for that solicitor to be prohibited from acting in a case. Under r 4 of the LPE(PE) 1978, it is sufficient that if there is reason to believe that the solicitor's conduct will be impugned for him to be prohibited from acting in the said case.

[36] I find that based on the pleadings and the evidence in the affidavits, there is reason to believe that the professional conduct of the solicitors in Messrs Armiy Rais is likely to be impugned in this case. How was it possible for the firm's client, D6, to be registered as shareholder of D1 without having paid the redemption sum under the SSA and without the original transfer

documents and the original share certificates? And how was it possible for D2 and D3 to replace the plaintiffs as directors of D1 without the resignation letters signed by the plaintiffs? These are questions likely to be asked of the plaintiffs' counsel of the solicitors in Messrs Armiy Rais during the trial of this suit. It would entail the solicitors in Messrs Armiy Rais that had negotiated, advised, acted for, and represented D6 in the SSA to be called as witnesses during the trial.

[37] Furthermore, Messrs Armiy Rais had written the letter dated 12 November 2018 to the stakeholder solicitors requesting for the original issue document of title for the land stating that it was acting for D6 and that it requires the title for 'our client's exercise of conversion of the Land'. D6 did not purchase the land under the SSA. Hence, it is very likely that the plaintiffs' counsel will subpoena as a witness for the trial of this suit, the solicitor in Messrs Armiy Rais who had written the letters in respect of the original issue document of title to the land to the stakeholders solicitors in November 2018. The solicitor is likely to be asked to explain why Messrs Armiy Rais who was acting for D6 in the SSA, had written the letter to the stakeholders solicitors asking for the issue document of title for the land.

[38] It is also likely that the plaintiffs' counsel will also call as a witness, Ong Kang Yong, the solicitor practicing at Messrs Armiy Rais, who had witnessed D11's signature on the SPA and who had executed the *surat akuan* on the Form 19B on 15 November 2019 for the lodgement of private caveat by D11 on the land.

[39] Rule 28(a) of the LPR(PE) 1978 states that an advocate and solicitor should not appear in court in any case where there is reason to believe that he will be a witness in respect of a material or disputed facts in the case.

[40] In *Lee Kam Sun v Ho Sau Lin & Anor* [1999] 4 MLJ 509; [1999] 4 CLJ 507; [1999] AMEJ 0046, James Foong J (as he then was) held:

> It is a well-established principle that lawyers should not act as counsel and witnesses in the same proceedings. The reason, as expounded by Beaumont CJ in *Emperor v Dadu Ramu* [1939] AIR Bom 150, is: '*An advocate cannot cross-examine himself, nor can he usefully address the Court as to the credibility of his own testimony, and a court may feel that justice will not be done if the advocate continues to appear*'. This rule is expressly accepted by the Federal Court in *Wong Sin Chong & Anor v Bhagwan Singh & Anor* [1993] 3 MLJ 679 at p 678; [1993] 4 CLJ 345; [1993] 2 AMR 3351. (Emphasis added.)

[41] In *Quah Poh Keat & Ors v Ranjit Singh a/l Taram Singh* [2009] 4 MLJ 293; [2009] 4 CLJ 316; [2009] 6 AMR 330, the Court of Appeal agreed with the High Court to invoke to r 28(a) of the LPR(PE) 1978 to disqualify the legal

firm Messrs Lee Hishamuddin to avoid the embarrassment during trial and to 'eliminate any possible conflict of interest surfacing on the solicitors' part and simultaneously ensured that the interests of the contesting parties were not compromised'. Suriyadi Halim Omar JCA (as he then was) said:

> [18] At the end of the appeal, we held the view that it would be unlikely that Datuk Naban would suggest to the respondent to pack his bags and go, if the conclusion of the meeting had not been in consonant with his or firm's legal views. If he had held a differing view, it was more than likely that the unpleasant duty of transmitting the bad news would have fallen on a KPMG official or some other unfortunate soul. By all account this finding of guilt of the respondent of gross misconduct, and followed by the instruction to pack his bags and go, are material issues, let alone hotly disputed as there was total denial by the respondent of the charges. *With the demands of r 28(a) (of the Legal Profession Rules (Practice and Etiquette) 1978) having been completely complied with, in particular the existence of the statutory requirements of material or disputed facts, we held the view that any reasonable man armed with those facts would anticipate the calling of these two lawyers as witnesses*. (Emphasis added.)

[42] Mr Ong argues that in respect of r 28(a) of the LPR(PE) 1978 there are no disputed or material question of facts that would require the presence of solicitors from Messrs Armiy Rais as witnesses in this suit. With respect to Mr Ong, the disputed facts in this case relate to the alleged fraud and/or wrongful acts perpetrated on the plaintiffs through or in relation to the SSA and the SPA — Messrs Armiy Rais had been involved in both agreements. Hence, contrary to Mr Ong's argument, there is every reason to believe that the solicitors in Messrs Armiy Rais who had been involved in the negotiations, drafting, acting and/or representing the parties in the SSA and SPA will be called as a witness in the trial of this suit. Thus, for this reason alone, under r 28(a) of the LPR(PE) 1978, Messrs Armiy Rais must be disqualified from acting for any of the defendants in this suit.

[43] Mr Ong further submits that even if solicitors from Messrs Armiy Rais are called to testify as witnesses, their testimony will only relate to matters which are formal or non-contentious: therefore, the firm is not prohibited from acting for D1, D6, D9, D10 and D11.

[44] I must confess that I am perplexed by Mr Ong's argument that if called as a witness, the solicitors from Messrs Armiy Rais will only be asked questions relating to 'formal or non-contentious' matters, so the firm is not prohibited from acting for the defendants in this case. With respect to Mr Ong, neither he nor this court are in a position to second guess the type of questions that the learned counsel for the plaintiffs will be asking the lawyers from Messrs Armiy Rais who are called to testify as witnesses during the trial in this suit. Moreover, r 28(a) of the LPR(PE) 1978 states that if there is reason to believe that an advocate or solicitor will be called as a witness in any case, he should not appear in court in that case. Rule 28(a) does not state that an advocate and solicitor can

act for a client in any case in court even if it is likely that he will be called as a witness in that case because he will only be asked 'formal or non-contentious questions'.

[45] In view of Messrs Armiy Rais' role in the SSA and SPA, I find that it would render it difficult for the lawyers in the firm who had advised and negotiated the SSA and SPA and who had acted for and represented D6 and D11 in both transactions to maintain their professional independence. This is especially in view of the conflict of interests and the likelihood that their conduct and that of the firm's may be impugned in this suit.

[46] For all these reasons, it would be incompatible with the best interest of justice for Messrs Armiy Rais to continue representing D1, D6, D10 and D11 in this suit. Therefore, I find that pursuant to rr 3, 4, 5 and 28(a) of the LPR(PE) 1978, Messrs Armiy Rais should no longer act for or represent D1, D6, D10 and D11 in this suit.

DECISION

[47] Accordingly, the plaintiffs' application in encl 56 to disqualify Messrs Armiy Rais from acting for D1, D6, D10 and D11 in this suit is allowed.

Enclosure 56 allowed.

Reported by Dzulqarnain Ab Fatar